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**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1961**

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**No. 69**

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**JOHN MACHIBRODA,**

*Petitioner,*

**vs.**

**UNITED STATES,**

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**BRIEF FOR THE PETITIONER**

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**BRIEF FOR THE PETITIONER**

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**Opinions Below**

The opinion of the Court of Appeals (R. 59) is reported at 280 F.2d 379 (6th Cir. 1960). The memorandum and order of the District Court (R. 47-58) are reported at 184 F. Supp. 881 (N.D. Ohio 1959).

**Jurisdiction**

The judgment of the Court of Appeals was entered on June 6, 1960 (R. 59). The petition was filed July 22, 1960, and was granted March 20, 1961. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

### **Questions Presented**

1. Whether the District Court properly overruled, without a hearing, a motion to vacate and set aside sentences aggregating forty years of imprisonment on the ground that petitioner's pleas of guilty on two indictments had been entered in accordance with an agreement with the Assistant United States Attorney prosecuting the case that the total sentence would be no more than twenty years.

2. Where the District Court, in accepting petitioner's pleas of guilty, did not act in conformity with Rule 11 of the Federal Rules of Criminal Procedure, in that the Court made no inquiry of petitioner to determine that the pleas were made voluntarily with understanding of the nature of the charges, are the judgments of conviction and the sentences invalid and subject to collateral attack?

3. Whether the sentences imposed upon petitioner are invalid and subject to collateral attack where the District Court, at the time of imposing sentence, failed to follow the mandatory procedure of Rule 32(a) of the Federal Rules of Criminal Procedure, in that the Court did not afford an opportunity to petitioner to make a statement in his own behalf nor to present any information in mitigation of punishment.

### **Rules and Statute Involved**

Rule 11 of the Federal Rules of Criminal Procedure provides:

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the

plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 32(a) of the Federal Rules of Criminal Procedure provides:

(a). Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 35 of the Federal Rules of Criminal Procedure in pertinent part provides:

The court may correct an illegal sentence at any time.

Section 2255 of the Judicial Code, 28 U.S.C. §2255, provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

### Statement

Petitioner instituted this proceeding to vacate and set aside two sentences aggregating forty years of imprisonment for two bank robberies. On February 24, 1956, petitioner appeared in the United States District Court for the Northern District of Ohio and entered pleas of guilty to both charges (R. 40). Sentence was not imposed until May 23, 1956. For the robbery of the Waterville State Savings Bank, petitioner received concurrent sentences of twenty-five and twenty years (R. 42-43). On the second charge of robbing the First National Bank of Forest, petitioner received two concurrent sentences of fifteen years, the latter sentences to be served consecutively to the twenty-five years in the first charge (R. 43). The total sentence thus was forty years.

On February 9, 1959, petitioner filed a "Motion to Vacate Sentences (Title 28 U.S.C.A. §2255)" in the United States District Court for the Northern District of Ohio (R. 13-20). This motion raised three substantial issues concerning the validity of petitioner's convictions and sentences. *First*, petitioner contended that his pleas of guilty were not voluntary, but rather had been induced by certain promises of the Assistant United States Attorney in charge of the prosecution. *Second*, petitioner asserted that the District Court had not complied with the mandatory requirement of Rule 11 of the Federal Rules of Criminal Procedure that the Court shall not accept a guilty plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. *Third*, petitioner alleged that, at the time of imposing sentence, the District Court had disregarded the obligatory procedure set forth in Rule 32(a) of the Federal Rules of Criminal Procedure by failing to provide petitioner with an opportunity to

make a statement in his own behalf or to present information in mitigation of punishment.

On the second and third of these contentions, there is no issue of fact. The transcripts of the proceedings of February 24, 1956, when petitioner entered his pleas of guilty, and of May 23, 1956, when the Court imposed sentence, were attached as exhibits to the response of the United States to petitioner's motion and are part of the record here (R. 39-43). These transcripts corroborate fully petitioner's assertions that the District Court had not acted in accordance with the simple requirements of the Rules of Criminal Procedure.

In accepting the pleas of guilty, the District Court asked petitioner one perfunctory question. After defense counsel had stated that the plea was guilty, the Court asked: "Is that your desire, Mr. Machibroda?" This occurred in connection with each plea (R. 40). The Court made no effort to ascertain whether petitioner was motivated to enter these pleas by any factors other than a desire to admit his guilt. Specifically the District Judge made no inquiry whether the pleas were induced by any promises or threats by the prosecutor. On the face of the record, the Court knew only that petitioner acquiesced in the announced plea of guilty.

Likewise, at the time of sentencing, the record unequivocally supports petitioner's contention that there was a plain violation of Rule 32(a). At no time was there any opportunity afforded to petitioner to speak in his own behalf. To be sure, the District Court did ask counsel for the defendant whether he had anything to say (R. 42). He did not. Whereupon the Court immediately pronounced sentence and the proceeding was closed (R. 42-43).

Both of these errors occurred in open court and are plain on the face of the record. Underlying them is peti-

tioner's first contention, which illustrates that the Rules do not require that inquiries be made of the defendant as mere matters of technical procedure. If the District Court had made searching inquiry into the voluntariness of the guilty pleas or invited the defendant to speak personally prior to imposing sentence, he might have discovered the nature and extent of an agreement between the defendant and the prosecutor, which forms the basis of petitioner's first contention.

In brief, petitioner now contends that he was induced by the Assistant United States Attorney to enter guilty pleas by a promise of leniency in the sentence and that he was coerced from revealing to the Court the terms of this agreement by threats of the prosecutor concerning other offenses. These allegations were made in considerable detail in his motion to vacate sentence. While the United States response denied the truth of these allegations (R. 24-32), there was no hearing held below. The issue was disposed of on the pleadings. For present purposes, therefore, petitioner's contentions must be taken as true.

It is unnecessary to set out in detail the substance of petitioner's allegations here. The full motion, and petitioner's affidavit in support thereof, appear in the Record at 13-23. Petitioner contends that there were three relevant conversations between the Assistant United States Attorney and himself. The first occurred in the County Jail on or about February 21, 1956, three days before arraignment, when the prosecutor promised petitioner that he would receive a total sentence of twenty years if he entered pleas of guilty. This promise was said to be made upon the authority of the United States Attorney and was agreeable to the Court. Petitioner was cautioned not to advise his attorney of the agreement.

The second conversation took place in the County Jail on May 22, 1956, the day before sentencing. At that time the Assistant United States Attorney reported to petitioner that the Judge was "vexed" because petitioner had testified in behalf of a co-defendant and that there might be some difficulty with respect to a sentence not exceeding twenty years. When petitioner protested that he would bring the whole agreement to the attention of the Court, the prosecutor replied that there was nothing to worry about, that if the Court imposed more than a twenty year sentence the United States Attorney would move to have the sentence reduced within sixty days. Petitioner was also impliedly threatened that, if he "insisted in making a scene," there were several other "unsettled matters" concerning other bank robberies "which would be added to the petitioner's difficulties" (R. 15).

The third conversation took place immediately after sentence had been announced on May 23. Again the Assistant United States Attorney promised that as soon as the Judge had "cooled off" the United States Attorney would have the sentence reduced to twenty years.

Petitioner further alleged that, subsequently, he sent two letters to the District Court and two letters to the Attorney General concerning the agreement with the prosecutor and the breach of the Government's part of the bargain. He received no replies to any of these letters.

The United States memorandum filed in the District Court in opposition to the motion to vacate denied these allegations. An affidavit of the Assistant United States Attorney involved admitted visiting the petitioner once in the County Jail, but only to talk about his testimony in the forthcoming case of the co-defendant who stood trial (R. 33-34).

V

The District Court denied relief on all three contentions. On the alleged agreement, the Court said that petitioner's charges were "serious" and that "if this Court had any doubt as to their falsity it would require a hearing" (R. 49-50). The Court, however, was positive that petitioner's assertions were false. This conclusion was based upon the failure of the defendant to make the charges for over two and a half years and upon a letter, dated November 30, 1956, to the Court from petitioner, asking for a reduction of sentence without mentioning any agreement on sentence between the prosecutor and himself. The Court styled this letter as "evidence which conclusively leads this Court to consider the allegations . . . to be false" (R. 50). While properly classified as "evidence," the letter was not, of course, introduced into the record as such. Petitioner was not given any opportunity to explain or rebut its contents. It was simply included as an attachment to the memorandum of the District Court (R. 55-56).

The District Court dismissed the contention that Rule 11 had been violated on the ground that petitioner had been represented by counsel at the arraignment, so that "there is no question but that the defendant voluntarily and with full understanding entered his pleas of guilty" (R. 54). The Court likewise dismissed the claim of a violation of Rule 32(a) with a reference to the inquiry addressed to counsel for the defendant and a citation to a case involving a "similar situation," *Sandroff v. United States*, 174 F.2d 1014 (6th Cir. 1949), cert. denied, 338 U.S. 947 (1950) (R. 54).

The Court of Appeals for the Sixth Circuit affirmed in a brief *per curiam* order (R. 59).

## ARGUMENT

### I

**Petitioner Is Entitled to a Hearing Under 28 U.S.C. §2255 on His Allegation That His Guilty Plea Was Wrongfully Induced by a Promise of the Prosecutor for a Lenient Sentence.**

#### **A. A GUILTY PLEA INDUCED BY PROMISES OF LENIENCY IS VOID.**

It is well settled by the decisions of this Court that a guilty plea which was the product of coercion or deception is a violation of the Constitution and subject to collateral attack. In *Walker v. Johnston*, 312 U.S. 275, 296 (1941), the Court held that if a defendant "... was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right." Walker had alleged a combination of deprivation of counsel together with inducement by the United States Attorney to plead guilty because he would be sentenced to twice as great a term if he did not so plead. One week later this Court reached the same conclusion with respect to a state prisoner who alleged that he had been induced to plead guilty by the promise that he would be dealt with leniently if he would plead guilty, and, further, that he had been tricked into entering a plea to a more aggravated offense than he had been led to believe was charged against him. *Smith v. O'Grady*, 312 U.S. 329 (1941).

The basis in principle for the special sensitivity to the motivation which underlies a guilty plea is revealed in the opinion of the Court in *Kercheval v. United States*, 274 U.S. 220, 223 (1927): "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it

is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."

Undoubtedly the closest case to the present proceeding is *Shelton v. United States*, 356 U.S. 26 (1958). Three years after pleading guilty to a charge of interstate transportation of a stolen automobile, Shelton filed a motion under 28 U.S.C. §2255 on the ground that his plea had been induced by various promises of the Assistant United States Attorney, who was said to have undertaken to arrange for dismissal of other pending charges against Shelton and to have guaranteed a sentence of not more than one year in the pending proceeding. Just prior to the arraignment, the prosecutor told Shelton not to "shoot his mouth off" or the court might not accept the plea. In accepting the plea, the court made no inquiry to determine whether the plea was voluntary, as required by Rule 11 of the Federal Rules of Criminal Procedure. There was no appeal.

The *Shelton* case is practically identical in all basic respects to the case now before the Court. In both, the Assistant United States Attorney induced the pleas of guilty by promises of leniency in the sentence (R. 14). In both, the Assistant United States Attorney cautioned the defendants not to tell the court of the agreement (R. 15). In both, the court accepted the pleas without making the mandatory inquiry into voluntariness provided by Rule 11 (R. 40). To be sure, Shelton was not represented by counsel while petitioner was. However, petitioner alleges that he was specifically advised by the prosecutor not to tell his attorney of the agreement (R. 15). Thus counsel was effectively shut out of the matter in the present case. In both cases,

the prisoner did not appeal and, several years after the event, sought relief under §2255.

Unlike the proceedings in the present case, the district court in *Shelton* held a plenary hearing on the motion to vacate. The court denied the §2255 motion, noting that the defendant had expressed gratitude to the court for the sentence at the time it was imposed and had waited until it had been almost completely served before attacking it.

On appeal, the Court of Appeals initially reversed. 242 F.2d 101 (5th Cir. 1957). In view of the later disposition of the case, it is important to note the rationale of the decision: "If a plea of guilty is made upon any understanding or agreement as to the punishment to be recommended, it is essential, we think, that, before accepting such plea, the district court should make certain that the plea is in fact made voluntarily. . . . The court, before accepting the plea, did not ascertain that it was in truth and in fact a voluntary plea not induced by such promise. It necessarily follows that the judgment of conviction must be set aside and the plea of guilty vacated." *Id.* at 113.

The Fifth Circuit granted a rehearing en banc, and the full court affirmed the order of the district court denying relief. 246 F.2d 571 (5th Cir. 1957). On petition for certiorari in this Court, the Court of Appeals decision was reversed without briefs or argument. This was done at the suggestion of the Solicitor General, who confessed error. The United States Memorandum declared: "We now believe that the plea of guilty was not properly made or accepted under Rule 11 of the Federal Rules of Criminal Procedure" (pp. 14-15). This Court agreed, announcing the reversal in a brief *per curiam* order. 356 U.S. 26 (1958).

The Solicitor General's Memorandum stressed certain elements peculiar to *Shelton's* situation, but none of these

seriously detracts from the force of that decision in the present proceeding. Most dealt with factors which made Shelton susceptible to an induced guilty plea, such as his claim of illness at the time, his aversion to county jails in which he was held awaiting trial, and the unusual delay in disposing of the pending charge due to a mistrial and the refusal of the Government to hasten a retrial by agreeing to trial to the court without a jury. In addition, Shelton had asserted to the prosecutor that he was not guilty. But none of these corroborating circumstances alters the basic pattern of the case, a plea induced by a prosecutor's promise of leniency and accepted by the court without compliance with Rule 11. That case is controlling authority here.

That a plea of guilty induced by promises of leniency is void has been held by several other Courts of Appeals. In *United States v. Paglia*, 190 F.2d 445 (2d Cir. 1951), it was alleged, *inter alia*, that the prosecutor had promised the defendant that he would recommend a sentence of not more than five years if the defendant would plead guilty. The district court had denied the motion without a hearing. Speaking for the court, Judge Learned Hand held that Paglia was entitled to a hearing on this and another issue. "If he succeeds upon either his sentence must be revoked and he must be resentenced . . . ." *Id.* at 448. See also *Motley v. United States*, 230 F.2d 110 (5th Cir. 1956); *Howard v. United States*, 486 F.2d 778 (6th Cir. 1951); *Ziebart v. United States*, 185 F.2d 124 (5th Cir. 1950); *Crowe v. United States*, 175 F.2d 799 (4th Cir. 1949), cert. denied, 338 U.S. 950 (1950). And see *Daniel v. United States*, 274 F.2d 768 (D.C. Cir. 1960); *Teller v. United States*, 263 F.2d 871 (6th Cir. 1959); *United States v. Parrino*, 212 F.2d 919 (2d Cir. 1954), cert. denied, 348 U.S. 840 (1954); *Michener v. United States*, 177 F.2d 422 (8th

Cir. 1949). Cf. *Euziere v. United States*, 249 F.2d 293 (10th Cir. 1957).

The United States, in the courts below, relied upon *United States v. Lowe*, 173 F.2d 346 (2d Cir. 1949), cert. denied, 337 U.S. 944 (1949); *Crowe v. United States*, 175 F.2d 799 (4th Cir. 1949), cert. denied, 338 U.S. 950 (1950); *United States v. Tacoma*, 176 F.2d 242 (2d Cir. 1950); *Tabor v. United States*, 203 F.2d 948 (4th Cir. 1953), cert. denied, 345 U.S. 1001 (1953); and *Meredith v. United States*, 208 F.2d 680 (4th Cir. 1953). None of these cases is apposite. In *Crowe*, a hearing was held on the motion to vacate the judgment. Tabor and Meredith did not charge that the inducement to plead guilty was made by the prosecutor; rather it appears that they were advised to do so by their own counsel. Thus their motions were probably insufficient on their face. While Lowe alleged an agreement between his own attorney and the prosecutor, his motion was accompanied by the affidavit of his own attorney specifically denying any collusion. Like Tabor and Meredith, Lowe therefore pleaded guilty on the advice of his own counsel. In *Tacoma*, the court of appeals decided only that nothing new was presented on a third effort to upset a conviction which justified reversal of two earlier decisions. There is no discussion in the opinion of a defendant's right to a hearing.

In both the Court of Appeals and in this Court, the United States cited *Johnson v. United States*, 239 F.2d 698 (6th Cir. 1956), cert. denied, 354 U.S. 940 (1957). That case had no claim of impropriety with respect to a guilty plea. He was tried and convicted by a jury. The court there decided that it need not grant a hearing on a motion which was composed of "incredible hearsay statements." *Id.* at 699. None of the allegations in the present case are hearsay. All refer to alleged conversations between the petitioner and the prosecutor. The *Johnson* case has no relevance here.

It is no longer open to question the availability of a collateral remedy to correct the violation of a constitutional right. *Walker v. Johnston* established the availability of habeas corpus for a federal prisoner who contended that his plea of guilty was the product of coercion and deception. *Smith v. O'Grady* did the same for persons held under the authority of state law. These cases stand in the long line of development of the statutory remedy of habeas corpus. At common law, the Great Writ did not inquire into the validity of the detention of a person who was held pursuant to a judgment of conviction of a crime entered by a competent tribunal. See *Ex parte Siebold*, 100 U.S. 371, 375 (1879). But the statutory remedy, now found in 28 U.S.C. §2241 through §2254, provides relief to any person "in custody in violation of the Constitution or laws or treaties of the United States." §2241(c)(3).

In the nineteenth century, this Court sanctioned use of the writ to inquire into the constitutionality of an act of Congress which created the crime for which the petitioner was imprisoned. *Ex parte Siebold*, *supra*. There were also the double-jeopardy cases, *Ex parte Lange*, 18 Wall. 163, 85 U.S. 163 (1873); *In re Snow*, 120 U.S. 274 (1887); *Hans Nielsen, Petitioner*, 131 U.S. 176 (1889). In the early part of this century, the primary developments in the scope of the writ concerned state prisoners. Mr. Justice Holmes wrote for the Court in *Moore v. Dempsey*, 261 U.S. 86 (1923), where allegation of mob domination of the state trial court supported issuance of the writ. The Court took another important step in *Mooney v. Holohan*, 294 U.S. 103 (1935), where it was held that a claim of knowing use by the state prosecutor of perjured testimony could be examined on habeas corpus.

In 1938, the decision in *Johnson v. Zerbst*, 304 U.S. 458 (1938), permitted the question whether there had been an

effectual waiver of counsel to be inquired into *de novo* in the habeas corpus proceeding. Then, in 1942, in a decision involving a claim of a coerced guilty plea, the Court declared that the writ "extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Waley v. Johnston*, 316 U.S. 101, 105 (1942). See, generally, Hart, *Foreword—The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 103-106 (1959); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1324-1332 (1961).

It is clear, therefore, that petitioner's claim in this case falls well within the scope of the habeas corpus remedy as it had evolved prior to the adoption of §2255 in the 1948 revision of the Judicial Code. This Court's decision in *United States v. Hayman*, 342 U.S. 205 (1952), established that the scope of the remedy under §2255 is at least as broad as is the remedy under the writ of habeas corpus. Accordingly, it is clear that petitioner's claim is a proper one under §2255. See *Shelton v. United States*, 356 U.S. 26 (1958).

The Courts of Appeals have almost without exception treated claims of induced or coerced guilty plea as cognizable under §2255. *Daniel v. United States*, 274 F.2d 768 (D.C. Cir. 1960); *Teller v. United States*, 263 F.2d 871 (6th Cir. 1959); *Watson v. United States*, 262 F.2d 33 (D.C. Cir. 1958); *Euziere v. United States*, 249 F.2d 293 (10th Cir. 1957); *Motley v. United States*, 230 F.2d 110 (5th Cir. 1956); *United States v. Paglia*, 190 F.2d 445 (2d Cir. 1951); *Michener v. United States*, 177 F. 2d 422 (8th Cir. 1949). But see *Mixon v. United States*, 214 F.2d 364 (5th Cir. 1954); *Donovan v. United States*, 205 F.2d 557 (10th Cir. 1953). Both of these latter cases were not followed in later decisions in the same circuit.

**B. INASMUCH AS THE DISTRICT COURT DENIED PETITIONER'S MOTION WITHOUT A HEARING, THE ALLEGATIONS IN HIS MOTION MUST BE ACCEPTED AS TRUE.**

Section 2255 plainly requires a hearing in the present case. It provides that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." This continues the rule applicable to petitions for habeas corpus. See *Walker v. Johnston*, 312 U.S. 275 (1941); *United States v. Hayman*, 342 U.S. 205, 213 (1952).

Certainly the motion in the present case does not conclusively show that the prisoner is entitled to no relief. To the contrary, as has been shown above, the motion presents a serious question of violation of the Constitution. If, after a hearing, petitioner's contentions are found to be true, his conviction must be set aside.

There is nothing in the files and records of the case which conclusively shows that petitioner is entitled to no relief. All of the relevant facts which underlie petitioner's claim took place out of court and are not a part of the record. There were three important conversations with the Assistant United States Attorney, according to the motion. The first two of these took place in the County Jail, one immediately prior to arraignment and the second prior to the sentencing hearing. The third conversation occurred after sentence had been imposed and the proceedings closed. Nothing in the files and records of the case will prove or disprove petitioner's allegations on these matters.

The District Court had two other sources of facts which ought not be considered in a summary disposition of a §2255 motion. One of these was the memorandum of the United

States and the affidavit of the Assistant United States Attorney alleged to have induced the guilty pleas. Both of these documents contradict petitioner's allegations, but that merely creates the issues of fact. A motion which states a valid claim to relief cannot be denied on these bases. This is too basic to require elaborate citation. See, e.g., *Daniel v. United States*, 274 F.2d 768 (D.C. Cir. 1960); *Teller v. United States*, 263 F.2d 871 (6th Cir. 1959); *Motley v. United States*, 230 F.2d 110 (5th Cir. 1956); *United States v. Paglia*, 190 F.2d 445 (2d Cir. 1951); *Howard v. United States*, 186 F.2d 778 (6th Cir. 1951); *Ziebart v. United States*, 185 F.2d 124 (5th Cir. 1950).

The second source of fact available to the court, and one which was very important in the court's decision, was a letter believed to have been sent by petitioner to the court some months after beginning service of his sentence. This letter was presumably not part of the "files and records" of the case. But, even if it is appropriate to consider such matter in making summary disposition of a motion, it is grossly unfair not to permit the prisoner, whose claims are being disparaged by an inference, to explain the basic letter, or indeed to challenge the authenticity of the letter itself. Only through a plenary hearing can the issues of fact raised by the motion be fairly tried. See *Price v. Johnston*, 334 U.S. 266, 291 (1948). The situation is not unlike the case of *United States v. Hayman*, 342 U.S. 205 (1952), where the district court had conducted an ex parte investigation prior to dismissing the motion under §2255. This Court held that the lower court had erred in making findings on controverted issues of fact relating to the prisoner's own knowledge without his being present.

Accepting petitioner's allegations as true, as must be done in the present proceeding, it necessarily follows that he must be accorded a hearing to determine the truth or falsity of the allegations.

## II

**Petitioner Is Entitled to Relief From Sentences Imposed in Violation of Federal Criminal Rule 32(a) on a Motion to Correct Sentence Under Rule 35 or Under 28 U.S.C. §2255.**

A. THE TRANSCRIPT OF THE SENTENCING PROCEEDING SHOWS PLAINLY A FAILURE OF THE DISTRICT COURT TO AFFORD THE DEFENDANT AN OPPORTUNITY TO MAKE A STATEMENT IN HIS OWN BEHALF OR TO PRESENT ANY INFORMATION IN MITIGATION OF PUNISHMENT.

When petitioner came before the District Court for sentencing on May 23, 1956, the Court opened the proceedings by asking counsel for the defendant whether he had anything to say. He said he did not (R. 42). At no time thereafter did the Court invite petitioner personally to say anything in his own behalf or to present any information in mitigation of punishment. The Court thus failed to comply with the mandatory requirements of Rule 32(a).

This case is governed by *Green v. United States*, 365 U.S. 301 (1961), establishing that Rule 32(a) was breached in the imposition of sentence upon petitioner. Eight members of the Court held that it was insufficient compliance with the Rule to invite counsel for the defendant alone to speak prior to announcing sentence. Thus, the fact that the Court here asked counsel if he had anything to say does not alter the conclusion that a violation of Rule 32(a) occurred. Mr. Justice Stewart, who held the view that there was no violation of the Rule in the *Green* case, expressed that view because counsel for Green had spoken fully on behalf of the defendant. Here, counsel responded to the Court's invitation by declaring that he had nothing to say.

There is no room in this case for the factual disagreement which, in *Green*, divided the eight members of the Court

sharing the view that Rule 32(a) required that the defendant himself be given an opportunity to speak. The district judge there had asked: "Did you want to say something?" On the cold record, four members of the Court found that the ambiguous "you" might well have been addressed to the defendant rather than to his counsel. Therefore, it was concluded that the defendant had failed to meet his burden of showing that he was not accorded the personal right which Rule 32(a) guarantees. 365 U.S. at 304-305. In the present case, the record suffers from no ambiguity. The only relevant question by the District Court was plainly addressed to the attorney for the defendant: "Does counsel for the defendant have anything to say in this matter?" Petitioner has met any conceivable burden of showing a violation of Rule 32(a).

**B. PETITIONER IS ENTITLED TO RELIEF FROM THIS VIOLATION OF RULE 32(a) IN A PROCEEDING FOR CORRECTION OF SENTENCE UNDER RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.**

Petitioner incorporates herein the argument on this point in the Brief for Petitioner in *Hill v. United States*, No. 68, October Term 1961. Unlike the *Hill* case, there was no limitation on the order of this Court granting certiorari (R. 60). Therefore, while petitioner instituted this proceeding under §2255, it cannot be doubted that the Court may treat the proceeding as arising under Rule 35 if it is advantageous to the prisoner to do so. *Heflin v. United States*, 358 U.S. 415 (1959), and cases cited in the *Hill* brief.

**C. PETITIONER IS ENTITLED TO RELIEF FROM THE VIOLATION OF RULE 32(a) IN A PROCEEDING TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255.**

If this Court should conclude that Rule 35 is not an appropriate remedy for a violation of Rule 32(a), petitioner

is entitled to relief under 28 U.S.C. §2255. The statute provides four general grounds for relief: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States," (2) "that the court was without jurisdiction to impose such sentence," (3) "that the sentence was in excess of the maximum authorized by law," and (4) that the sentence "is otherwise subject to collateral attack." While failure to comply with Rule 32(a) probably does not support a right to relief under the first three categories, it does make the sentence vulnerable to collateral attack.

Considerable confusion on the scope of §2255 has been engendered from its apparent relationship with the writ of habeas corpus, which it has largely superseded so far as federal prisoners are concerned. This Court held, in *United States v. Hayman*, 342 U.S. 205 (1952), that a §2255 proceeding afforded to a prisoner the same rights which were theretofore available under the habeas corpus jurisdiction. "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions." *Id.* at 219. Nothing in that case raised the question whether a §2255 proceeding was confined narrowly to *only* issues which might have been raised in habeas corpus.

Nevertheless, there is some loose language in lower court opinions to the effect that the scope of §2255 is limited to the scope of habeas corpus. This was picked up by BARRON, *FEDERAL PRACTICE AND PROCEDURE* §2306 (Supp. 1960): the motion "is confined to the relief which before adoption of statute might have been afforded in some other court through habeas corpus" (p. 225). None of the citations support the statement, except for unnecessary dicta. Some involved attempts by prisoners to resort to habeas corpus

without exhausting the §2255 remedy,<sup>1</sup> another to a premature motion for release under §2255.<sup>2</sup> In several, the only statement was that the statute did not broaden the scope of collateral attack, without reference to habeas corpus.<sup>3</sup> The remainder were cases in which the prisoner sought to raise questions like the technical sufficiency of the indictment or sufficiency of the evidence, which have never supported collateral attack in any form.<sup>4</sup>

The legislative history of §2255, set out fully in this Court's opinion in the *Hayman* case, does not indicate that §2255 is limited solely to the scope of habeas corpus. There are references that the statutory motion was to be as broad as habeas corpus. *E.g.*, H.R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947). The Statement, prepared by Circuit Judge Stone and submitted to the Senate and House Judi-

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<sup>1</sup> *Clough v. Hunter*, 191 F.2d 516, 518 (10th Cir. 1951); *Barrett v. Hunter*, 180 F.2d 510, 514 (10th Cir. 1950), cert. denied, 340 U.S. 897 (1950).

<sup>2</sup> *Crow v. United States*, 186 F.2d 704, 706 (9th Cir. 1950).

<sup>3</sup> *Smith v. United States*, 205 F.2d 768, 770 (10th Cir. 1953); *Pulliam v. United States*, 178 F.2d 777, 778 (10th Cir. 1949).

<sup>4</sup> *Taylor v. United States*, 229 F.2d 826, 832 (8th Cir. 1956), cert. denied, 351 U.S. 986 (1956); *Burns v. United States*, 229 F.2d 87, 89 (8th Cir. 1956), cert. denied, 351 U.S. 910 (1956); *Taylor v. United States*, 177 F.2d 194, 195 (4th Cir. 1949); *United States v. Walker*, 132 F. Supp. 432, 436 (S.D. Cal. 1955). A more difficult case, not cited by BARRON, is *Smith v. United States*, 187 F.2d 192 (D.C. Cir. 1950). Smith alleged in his motion for relief under §2255 that a confession had been obtained from him in violation of the rule laid down in *McNabb v. United States*, 318 U.S. 332 (1948). It is not clear from the opinion whether Smith, who had counsel at his original trial, challenged the confession when it was introduced into evidence. In any event, he did not appeal. The court of appeals held that this issue would not have supported habeas corpus relief and, therefore, that it was not cognizable under §2255. A similar problem is now before the Court from the same circuit in *Hodges v. United States*, No. 58, October Term 1961.

ciary Committees on behalf of the Judicial Conference Committee on Habeas Corpus Procedure, described the 1944 Judicial Conference bill as covering all situations where the sentence is "open to collateral attack." (Quoted in *United States v. Hayman*, 342 U.S. at 216-217.) The Committee on Revision of the Laws of the House of Representatives modeled §2255 after the Judicial Conference bill. *Id.* at 218. The Reviser's Note to §2255 declared that the section "restates . . . the procedure in the nature of the ancient writ of error coram nobis . . . [and] provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus."

Prior to 1948 several lower courts entertained motions to vacate or correct sentence which raised issues not cognizable in habeas corpus. E.g., *Williams v. United States*, 168 F.2d 866 (5th Cir. 1948); *Nivens v. United States*, 139 F.2d 226 (5th Cir. 1943), cert. denied, 321 U.S. 787 (1944); *Peterson v. United States*, 39 F.2d 336 (8th Cir. 1930) (treated as coram nobis). See especially *Waldron v. United States*, 146 F.2d 145 (6th Cir. 1944), and *United States v. Rothstein*, 187 Fed. 268 (7th Cir. 1911), where the courts provided relief to prisoners who had been convicted under statutes subsequently held unconstitutional. Compare *United States v. Thompson*, 261 F.2d 809 (2d Cir. 1958), cert. denied, 359 U.S. 967 (1959).

The history of §2255 in the post-1948 period bears out the fact that the statute provides a remedy somewhat broader than was available under habeas corpus. See, e.g., *United States v. Russo*, 260 F.2d 849, 850 (2d Cir. 1958); *Poole v. United States*, 250 F.2d 396, 401 (D.C. Cir. 1957); *Brooks v. United States*, 223 F.2d 393 (10th Cir. 1955); *Pugh v. United States*, 212 F.2d 761 (9th Cir. 1954). The most dramatic evidence is the frequency with which the courts have entertained the precise issue in this case, violation of

Rule 32(a), in a §2255 proceeding. The District of Columbia Court of Appeals granted relief in *Jenkins v. United States*, 249 F.2d 105 (D.C. Cir. 1957). That court thus resolved the question left open in *Couch v. United States*, 235 F.2d 519 (D.C. Cir. 1956), where the court found no violation of Rule 32(a). Four of the eight judges participating expressly stated no views on the availability of relief under §2255 in the event that a violation was found. The decision in *Jenkins* resolved the issue in favor of providing relief. Other courts, while denying relief, have reached the merits of contentions of violation of Rule 32(a). The Fifth Circuit held, in *Kennedy v. United States*, 259 F.2d 993 (5th Cir. 1958), that counsel for the defendant had waived the right of the accused to speak and that this waiver was binding. The Tenth Circuit rejected a claim on the merits because the record showed that the court had asked the defendant if he had anything to say. *Pence v. United States*, 219 F.2d 70 (10th Cir. 1955). Two district court judges in the Southern District of New York held that Rule 32(a) did not require a direct invitation to the defendant to speak. *United States v. Miller*, 156 F. Supp. 261 (S.D.N.Y. 1958); *United States v. Sousa*, 156 F. Supp. 506 (S.D.N.Y. 1957). Therefore, these courts denied relief, the decisions antedating this Court's decision to the contrary in *Green v. United States*, *supra*. In *United States v. Carminati*, 25 F.R.D. 31 (S.D.N.Y. 1960), Judge Weinfeld held that Rule 32(a) was not violated where, despite the lack of a personal invitation to the defendant to speak, defense counsel had addressed the court and included in his remarks statements made expressly at the behest of the defendant. On appeal, the Second Circuit found the prisoner's contention so plainly without merit that it did not face the question whether the contention can be raised in a post-conviction proceeding. *United States v. Galgano*, 281 F.2d 908 (8th Cir. 1960).

There is thus ample authority in the lower courts for reaching the merits of claimed violations of Rule 32(a) in §2255 proceedings. But see *Mixon v. United States*, 214 F.2d 364 (5th Cir. 1954). While only one of these was a successful attack on the sentence, *Jenkins v. United States*, *supra*, that case is the only one in which neither the defendant nor his attorney spoke prior to imposition of sentence. Counsel for Jenkins said only that he had nothing to say. Pence spoke for himself. Counsel for defendant spoke in the *Couch*, *Miller*, *Sousa* and *Carminati* cases. The opinions in *Kennedy* and *Mixon* are unclear. It is possible to say, therefore, that §2255 relief has never been denied in a case like the present where counsel was silent and the defendant was not asked to say anything in mitigation of punishment.

**D. FOLLOWING THE PRINCIPLE OF SPECIALLY PROTECTING THE MOST IMPORTANT RIGHTS OF A CRIMINAL DEFENDANT, A PRINCIPLE WHICH HAS CONSISTENTLY GUIDED THE DEVELOPMENT OF POST-CONVICTION REMEDIES, THIS COURT SHOULD FIND THAT §2255 IS AN AVAILABLE REMEDY FOR VIOLATION OF RULE 32(a).**

It is highly appropriate to provide through §2255 for the correction of an illegal sentence which was imposed in violation of Rule 32(a). Undoubtedly the precise definition of the proper scope for any collateral remedy is a vexing question. But the guiding principle which ought to control the matter has at all times been clear. Post-conviction relief should be made available as exceptional protection for those fundamental rights and guarantees which are basic to a fair trial. The ancient right of allocution, now provided by the Federal Criminal Rules, is such a basic guarantee of fairness as to warrant the protection of §2255.

Various concepts have been used in Anglo-American history in an attempt to describe those fundamental rights

which shall receive the exceptional process of a post-conviction remedy. The changing characterization reflects a civilization constantly advancing in the nature and extent of the procedural safeguards afforded to the criminally accused.

In the early days of the common law, the Great Writ of habeas corpus tested only the bare competence of a tribunal to try a case and impose sentence. A modern example is *Smith v. United States*, 300 U.S. 1 (1930). If the court which imposed sentence had jurisdiction to try that offense, the inquiry ended. The writ of error coram nobis (or coram vobis) protected certain rights of status in accordance with the strict common-law definitions of what constituted a juridical person. See *United States v. Morgan*, 346 U.S. 502 (1954).

This evolutionary process was clearly noted by the Third Circuit in *United States v. Steese*, 144 F.2d 439 (3d Cir. 1944): "We think, however, a court is not helpless to remedy an injustice, if one is proved to have been committed, which goes to the extent of depriving a man of his constitutional rights. . . . We think the present question involving protection of one's rights under the constitution is just as fundamental as those for the protection of which this time honored writ [coram nobis] was devised and used in the early common law procedure." *Id.* at 442.

The gradual development in this country of the writ of habeas corpus has already been discussed above. The minimal concept of a competent court blended into a requirement that the court have jurisdiction. Then the concept of jurisdiction steadily grew, incorporating within itself many rights guaranteed by the Constitution, until the violation of constitutional rights became recognized independently as a ground for relief.

The principle of protecting basic rights operated most clearly next to relieve prisoners from sentences which ex-

ceeded the maximum authorized by Congress. These cases did not involve any challenge to the competency or jurisdiction of the court. Nor did they involve any constitutional right. Mr. Justice Brennan summed up many of these in his opinion for the Court in *Ladner v. United States*, 358 U.S. 169 (1958). The only issue in these cases was one of statutory construction. Nevertheless, on the resolution of this question directly turns the extent to which a prisoner may be deprived of his liberty. Certainly they fit within the principle of providing post-conviction procedures to preserve fundamental rights.

These major historical developments are plainly reflected in the first paragraph of §2255, setting forth the various grounds for relief. Thus the statute provides a remedy if the court was "without jurisdiction." And a sentence is voidable if imposed "in violation of the Constitution or laws of the United States." Further, a sentence can be set aside if it is "in excess of the maximum authorized by law." These parallel the three major developments, discussed above. But the statute continues with a fourth category for voiding any sentence "otherwise subject to collateral attack."

On the principle which has shaped the growth of the more firmly established grounds for setting aside a prior sentence, this Court should conclude that a remedy exists to redress violations of Rule 32(a). This, too, is a basic right of criminal defendants. It is the only occasion for a defendant to try to influence the court on the type and severity of the sentence he will receive. In many cases, where guilt is clear, the only real question is the sentence to be imposed. That is especially true where, as in this case, the defendant enters a guilty plea on arraignment. In adopting the Federal Rules of Criminal Procedure, this Court made it mandatory upon the sentencing court to ask the defendant to speak in his own behalf if he so desired. There are few such un-

conditional directives to trial judges in the Rules. Where they exist, they are associated with those basic rights which are most important to the defendant. See, e.g., Rules 11 and 44. This Court has, by Rule 32(a), already given the right of allocution the stature reserved for the most important of the safeguards provided to a defendant. It would be entirely fitting to insure the maximum preservation of that right by recognizing that violation of the rule is a ground for collateral relief.

### **Conclusion**

For the reasons stated in Point I, it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to the district court for a hearing on petitioner's allegations. In any event, for the reasons stated in Point II, it is submitted that petitioner is entitled to be resentenced in accordance with the Rules of Criminal Procedure.

Respectfully submitted,

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*Counsel for Petitioner*

August 25, 1961

**Certificate of Service**

I certify that I have served a copy of this Brief for Petitioner upon the Solicitor General of the United States by depositing a copy of the same in a United States post office, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C.

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**August 24, 1961**